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**IN THE
COURT OF APPEALS OF INDIANA**

RANDAL R. SHEPPARD,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 20A03-0701-PC-7
)	
STATE OF INDIANA,)	
)	
Appellee-Respondent.)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0605-PC-2

May 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Randal Sheppard appeals his sentence after pleading guilty to Dealing in Cocaine, as a Class B felony. He presents the following issues for our review:

1. Whether his guilty plea was made knowingly, intelligently, and voluntarily.
2. Whether he was denied the effective assistance of guilty plea counsel.

We affirm.

FACTS AND PROCEDURAL HISTORY

On September 2, 2004, Sheppard pleaded guilty to dealing in cocaine, as a Class B felony. His plea agreement left sentencing open to the trial court's discretion, but also provided that the State recommended a fifteen-year sentence with five years suspended. At the conclusion of the sentencing hearing, the trial court rejected the State's recommendation and imposed a fifteen-year executed sentence.

Sheppard filed a petition for post-conviction relief alleging that his guilty plea was not knowing, intelligent, or voluntary. In particular, Sheppard asserted that his guilty plea counsel had misled him into believing that the trial court was bound to sentence him according to the State's recommendation. Following a hearing, the post-conviction court denied his petition. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Guilty Plea

Defendants who can show that they were coerced or misled into pleading guilty by the judge, prosecutor or defense counsel will present colorable claims for relief. State v.

Moore, 678 N.E.2d 1258, 1266 (Ind. 1997). In assessing the voluntariness of the plea, we will review all the evidence before the court which heard the defendant's post-conviction petition, including testimony given at the post-conviction hearing, the transcript of the petitioner's original sentencing, and any plea agreements or other exhibits which are a part of the record. Id. If the evidence exists to support the post-conviction court's determination that the guilty plea was voluntary, intelligent and knowing, we will not reverse. Moffitt v. State, 817 N.E.2d 239, 249 (Ind. Ct. App. 2004), trans. denied.

Sheppard contends that he would not have entered into his guilty plea had he known that the trial court was not bound by the State's sentencing recommendation. He maintains that defense counsel misinformed him that the trial court would impose the recommended sentence. However, our review of the record does not support his contention.

The written plea agreement expressly provides that the term of Sheppard's sentence "will be left to the discretion of the Court" and that "the State of Indiana agrees to recommend that the Defendant receive a sentence of 15 years with 5 of those years being suspended." Petitioner's Exhibit A. And, during the guilty plea hearing, the trial court thoroughly advised Sheppard regarding his possible sentence, as set out in the plea agreement:

Court: [The guilty plea] also provides that sentencing will be left to my discretion within the statutory parameters fixed by the legislature. It also provides that the State of Indiana will recommend that the sentence imposed be 15 years with 5 of those 15 years suspended on presumably a like term of reporting probation . . . but it is understood by the parties that the State's recommendation is not binding on me. It also provides that the State will not interpose an objection to work

release at Riverside Residential Work Release Facility in Indianapolis. Again, that's not binding on me and not binding on Riverside. Have I correctly summarized the terms of the plea agreement as you understand them?

Sheppard: Yes, sir.

Court: Is that what you wish to do?

Sheppard: Yes, sir.

* * *

Court: This plea agreement has been reduced to writing. I have a copy of the document which recites it before me. In looking at that document, I note that it was signed by your lawyer, Mr. Garcia. It was also signed by Brian Lakey, one of the deputy prosecuting attorneys assigned to this court. It purports to bear your signature. Did you in fact sign this document?

Sheppard: Yes, I did.

Court: Did you read it in its entirety before you did so?

Sheppard: Yes, sir.

Court: Did you understand it when you read it?

Sheppard: I sure did, Judge.

Court: Did you have an opportunity to review it with Mr. Garcia, your lawyer, before you signed it?

Sheppard: Yes, sir.

Court: Are you satisfied with the advice, counsel, and representation provided you in this case by Mr. Garcia?

Sheppard: I am, sir.

Court: Is there anything which you believe Mr. Garcia should have done for you that he did not do?

Sheppard: No, sir.

Court: Turning your attention again to this plea agreement, did anyone offer you anything of value other than the benefits which you received pursuant to the terms of the agreement itself in order to induce you to enter into this plea agreement?

Sheppard: No, sir.

* * *

Court: Since this plea does not restrict my discretion as to sentencing, I will accept the plea today so long as the Defendant supplies me with a factual basis for the offered plea.

Petitioner's Exhibit B at 8-10, 16 (emphases added).

This colloquy between the trial court and Sheppard demonstrates that Sheppard was aware that, by pleading guilty, the trial court had discretion in imposing his sentence and was not bound by the State's recommendation. Accordingly, the post-conviction court did not err when it found that Sheppard voluntarily, intentionally, and knowingly entered into the guilty plea.

Still, Sheppard maintains that his defense counsel advised him that the trial court would impose the State-recommended sentence. But during the post-conviction hearing, his defense counsel testified: "I don't recall exactly what I said to Mr. Sheppard. However, I doubt that I would guarantee a sentence that is left up to the Court, though." Transcript at 21. The only evidence to support Sheppard's assertion is his self-serving testimony. Because evidence exists to support the post-conviction court's determination that the guilty plea was voluntary, intelligent and knowing, we will not reverse.

Issue Two: Ineffective Assistance of Counsel

Sheppard also contends that but for his counsel's statement that the trial court would impose the State-recommended sentence, he would not have pleaded guilty. As such, he contends that he was denied the effective assistance of guilty plea counsel. We cannot agree.

There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the defendant to overcome that presumption. Gibson v. State, 709 N.E.2d 11, 13 (Ind. Ct. App. 1999), trans. denied. To make a successful ineffective assistance claim, a defendant must show that: (1) his attorney's performance fell below an objective standard of reasonableness as determined by prevailing professional norms; and (2) the lack of reasonable representation prejudiced him. Mays v. State, 719 N.E.2d 1263, 1265 (Ind. Ct. App. 1999) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)), trans. denied. Even if a defendant establishes that his attorney's acts or omissions were outside the wide range of competent professional assistance, he must also establish that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. See Steele v. State, 536 N.E.2d 292, 293 (Ind. 1989).

For ineffective assistance of counsel claims relating to penal consequences, a petitioner must establish, by objective facts, circumstances that support the conclusion that counsel's errors in advice as to penal consequences were material to the decision to plead. Segura v. State, 749 N.E.2d 496, 507 (Ind. 2001). Merely alleging that the petitioner would not have pleaded is insufficient. Id. Rather, specific facts, in addition to

the petitioner's conclusory allegation, must establish an objective, reasonable probability that competent representation would have caused the petitioner not to enter a plea. Id.

Here, Sheppard does not cite to any objective facts in support of his contention that he would not have pleaded guilty had he known that the trial court was not bound by the State's recommendation. Further, defense counsel's testimony at the post-conviction hearing does not support Sheppard's contention that he was misinformed regarding sentencing. In particular, his counsel testified as follows:

Q: And what sentence did you tell Mr. Sheppard he would receive?

A: I don't recall the exact words. My recollection of the Agreement [is] that it was a chips plea meaning an open B [felony]. He could receive a sentence from 6 to 20 years with a recommendation from the State of fifteen years, five years suspended.

Q: Is it possible that you told Mr. Sheppard he would . . . receive fifteen years with five suspended?

A: I don't—I doubt I would say that. I usually don't speak in absolute terms in talking about sentences when left to the discretion of the Court. That being said, I do not recall exactly what I had said to Mr. Sheppard.

COURT: Pardon me?

A: I said I don't recall exactly what I said to Mr. Sheppard. However, I doubt that I would guarantee a sentence that is left up to the Court, though.

Transcript at 21 (emphasis added).

Given defense counsel's inability to recall what he had told Sheppard and his "doubt" that he would have promised Sheppard a particular sentence, Sheppard cannot show that his counsel's performance fell below an objective standard of reasonableness. Moreover, Sheppard's self-serving statement that he would not have otherwise pleaded

guilty is insufficient to show that the post-conviction court erred when it ruled on this issue. Sheppard has failed to establish an objective reasonable probability that competent representation would have caused him not to enter a plea. See Segura, 749 N.E.2d at 507. Sheppard has not demonstrated that he was denied the effective assistance of guilty plea counsel.

Affirmed.

RILEY, J., and BARNES, J., concur.